

**Amendment and Response**

Applicant: Charley Y. Lloyd et al.

Serial No.: 09/781,583

Filed: February 12, 2001

Docket No.: 5520USA

Title: PORTABLE CONTAINER SEPARATELY CONTAINING TWO CONSUMABLE PRODUCTS, AND A DRY CONSUMABLE PRODUCT, ESPECIALLY RTE CEREAL, FOR USE THEREWITH

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**REMARKS**

This Amendment is responsive to the Office Action mailed April 24, 2003. In that Office Action, the Examiner acknowledged receipt of the Request for Continued Examination, previously filed on March 6, 2003, and withdrew the finality of the previous Office Action. The Examiner also rejected claim 7 under 35 U.S.C. §112, first paragraph as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claims 1, 4-7, 10-15, 19-24, 32-40, 43-50, 53, and 54 were rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson, U.S. Patent No. 5,706,980 ("Dickerson") in view of Newarski, U.S. Patent No. 5,727,679 ("Newarski"), Foehse et al., U.S. Patent No. 5,151,283 ("Foehse"), and Perry et al., Perry's Chemical Engineers' Handbook, ©1997 ("Perry"). Claims 21, 22, 24, and 46-48 were rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Kraig et al., U.S. Patent No. 4,515,822 ("Kraig") and Perry. Finally, claims 32-38 and 53 were rejected under 35 U.S.C. §103(a) as being unpatentable over Ness et al., U.S. Patent Application Publication No. 2002/0192338A1 ("Ness") in view of Foehse.

With this Response, claim 11 has been cancelled, and claims 7, 12, 14, and 39 have been amended. A Declaration under C.F.R. §1.131 is concurrently submitted with this Response. Claims 1, 4-7, 10, 12-15, 19-24, 32-40, 43-50, 53, and 54 remain pending and are presented for reconsideration. It is believed that all pending claims are now in a condition for allowance. Notice to that effect is respectfully requested.

**35 U.S.C. § 112 Rejections**

Claim 7 was rejected under 35 U.S.C. §112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. The Examiner stated that the specification did not provide the proper support for "a density less than 375 g/100 inch<sup>3</sup>" (paper no. 14, paragraph 3). Claim 7 has been amended

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to recite a dry consumable product comprised of a plurality of pieces each having a density in the range of 225 – 375 g/100 inch<sup>3</sup>, as supported by the original specification at least at page 7, lines 30-31 and page 8, lines 4-5. This Amendment is believed to traverse the Examiner's rejection. Therefore, Applicants respectfully submit that amended claim 7 satisfies the requirements of 35 U.S.C. §112, first paragraph.

**35 U.S.C. § 103 Rejections**

Claim 1 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. Claim 1 relates to a portable, packaged consumable good article including a container, a liquid consumable product, and a dry consumable product. The container includes a first compartment, a second compartment connected to the first compartment, a first pour opening associated with the first compartment for allowing restrictive flow of contained product therefrom, and a second pour opening associated with a second compartment for facilitating restricted flow of a contained product therefrom. The liquid consumable product is contained within the first compartment. The dry consumable product is contained within the second compartment and includes a plurality of substantially uniform, substantially spherical pieces each having a diameter in the range of 0.2 – 0.25 inch and a density not less than 225 g/inch<sup>3</sup>. The container is adapted to facilitate on-the-go consumption of the liquid and dry consumable products. None of the cited references teach or otherwise suggest such limitations.

For example, Dickerson relates to a comestibles consumption device for the simultaneous dispensation of liquid and a dry comestible by the force of gravity when tilted for use (Dickerson, Abstract). As cited by the Examiner, Dickerson fails to teach a dry consumable product having a uniform size or density (paper no. 14, paragraph 6). Although Dickerson recognized the problems with simultaneous product dispensation caused by differing physical properties and flow characteristics of the products to be consumed, Dickerson describes that “the comestibles consumption device. . . is able to solve these problems.” (emphasis added) (column 3, lines 11-14 and 20-22). In particular, “control of the flow of the dry comestible out of the inner container

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is achieved by the lid” of the device itself (column 4, lines 5-9). Since the device described in Dickerson independently solves the problem of differing uniform flow solely by design of the consumption device, the problem of differing flow is no longer of consequence. Therefore, there is no need or reason to modify any of the flow characteristics of the dry comestible contained therein. Rather, an objective of the Dickerson device is to provide a consumption device to dispense dry comestibles such as nuts, raisins, popcorn, small snack foods, and small fruits (column 2, lines 50-56). Such dry comestibles inherently do not have a substantially uniform plurality of pieces. Nonetheless, the Dickerson consumption device is specifically designed to aid in their consumption despite their inherent lack of uniformity. According to Dickerson, following implementation of the consumption device described in Dickerson, physical flow characteristics are no longer a problem for simultaneous consumption. Therefore, the packaged good article of Dickerson does not teach or otherwise suggest modifying the dry comestible product to have substantially uniform pieces.

As such, Dickerson provides no motivation to look to the Perry reference. The Perry reference is cited by the Examiner as teaching a solution to Dickerson’s problem of varying flow characteristics (paper number 14, paragraph 9). However, as described above, the problem of varying flow characteristics is the exact problem the device of Dickerson was designed to solve. The specific passage of Perry cited by the Examiner relates solely to problems associated with differing flow characteristics (Perry, p. 21-30, column 2). As described above, following design of the consumption device of Dickerson, varying flow characteristics are no longer a problem, and therefore, there is no suggestion to look to Perry to modify the consumable product disclosed in Dickerson to incorporate the limitations of independent claim 1. Rather, any suggestion or motivation to combine the references of Dickerson and Perry comes from the present application which is impermissible hindsight and, therefore, is not a valid source of a suggestion to combine references for obviousness purposes (*See MPEP* §2143; *In re Bond*, 910 F.2d 831, 834, 15 USPQ2d 566, 568 (Fed. Cir. 1990), *reh’g denied*, 1990 U.S. App. LEXIS 1971 (Fed. Cir. 1990)).

In addition, Foehse fails to teach or otherwise suggest the dry consumable products comprising a plurality of substantially uniform, substantially spherical pieces each having a

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diameter in the range of 0.2 – 0.25 inch as recited in independent claim 1. As cited by the Examiner, Foehse discloses a variety of density and diameter ranges (paper number 14, paragraph 8). However, as also cited by the Examiner, the diameters disclosed in Foehse range from 0.098 to 0.991 inch (paper number 14, paragraph 8; Foehse disclosure, column 8, lines 20-34, column 9, lines 13-29). This large range of diameters in no way suggests the dry consumable product having substantially uniform pieces with regard to their diameter. In direct contrast, Foehse allows diameters of the dry consumable product to differ on a magnitude of 10.

Moreover, even if Perry is a properly combined reference, Perry gives no definition of what “uniformity” of particle size should be. In fact, Perry teaches that “[i]n general, it may be assumed that the larger the particle size . . . the more easily the material will flow.” (Perry, p. 21-30, col. 2). As such, the teachings of Foehse in view of Perry dictates that the largest size of the range in Foehse be selected (i.e., 0.991 inch), which is clearly outside of the 0.2 - 0.25 inch limitation of claim 1. Notably, if Perry is used to suggest substantially uniform pieces the related teachings of the reference also must be incorporated. “It is impermissible to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art.” *Bausch & Lomb, Inc. v. Barnes-Hind Hydrocurve, Inc.*, 796 F.2d 443, 448 (Fed. Cir. 1986). Therefore, Foehse fails to teach or otherwise suggest a dry consumable product comprising a plurality of substantially uniform, substantially spherical pieces each having a diameter in the range of 0.2 - 0.25 inch as required by the limitations of independent claim 1. Newarski fails to alter this analysis.

For at least the above described reasons, none of the cited references teach or otherwise suggest the limitations of independent claim 1. Accordingly, Applicant believes independent claim 1 to be allowable.

Claims 4-6 were also rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. Each of claims 4-6 depend from independent claim 7, which as described above is not taught or otherwise suggested by any of the cited references. Consequently, dependent claims 4-6 are allowable.

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Independent and amended claim 7 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. Amended claim 7 relates to a portable, packaged consumable good article similar to that described with respect to independent claim 1, differing only with respect to the dry consumable product contained within the second compartment. In amended claim 7, the dry consumable product is comprised of a plurality of substantially uniform pieces each having a maximum outer dimension in the range of 0.2 – 0.25 inch and a density in the range of 225 – 375 g/100 inch<sup>3</sup>. None of the cited references teach or otherwise suggest such limitations.

For similar reasons as described with respect to independent claim 1, Dickerson fails to teach or otherwise suggest a plurality of substantially uniform pieces as required by amended claim 7. In particular, the consumption device of Dickerson itself “solves” the problems associated with varying flow characteristics of the comestible products contained therein. In fact, the consumption device of Dickerson is specifically designed to contain and dispense dry comestibles having non-uniform flow characteristics such as nuts, raisins, and small fruits (column 2, lines 50-56). Therefore, as described with respect to independent claim 1, there is no suggestion to combine the consumable good article of Dickerson with the teachings of Perry to satisfy the limitations of amended claim 7. Also as described above, Newarski and Foehse fail to teach or otherwise suggest such limitations. Foehse teaches a large allowable range of diameters differing on a magnitude of 10, and, as such does not teach a plurality of substantially uniform pieces. Even if Perry is viewed as a valid reference, Perry combined with Foehse teach using the upper range of Foehse diameters (i.e., 0.991 inch), which is well outside the maximum outer dimension range of 0.2 – 0.25 inch of amended claim 7. For at least the above described reasons, independent claim 7 is believed to be allowable.

Claims 10-12, and 13 were also rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. Each of dependent claims 10-12, and 13 depend from independent claim 7, which as described above, is not taught or otherwise suggested by any of the cited references. As a result, dependent claims 10-12, and 13 are also believed to be similarly allowable.

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Claims 14, 15, 19, and 20 were also rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. For similar reasons as described above with respect to independent claims 1 and 7, amended, independent claim 14 is not taught or otherwise suggested by any of the cited references. Dependent claims 15, 19, and 20 each depend from amended claim 14. As such, claims 14, 15, 19, and 20 are all believed to be allowable over the cited references.

Independent claim 21 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry and under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Kraig and Perry. Independent claim 21 relates to a portable, packaged consumable good article similar to independent claim 1 differing primarily with respect to the dry consumable product contained within the second compartment. Independent claim 21 recites the dry consumable product including a plurality of pieces of that are substantially uniform in at least two characteristics selected from the group consisting of a shape, size, and density. The selected characteristics are configured to promote substantially uniform, gravity-induced flow through the second pour opening. For similar reasons as described above, none of the cited references teach or otherwise suggest such limitations.

In particular, Dickerson specifically states that it is able to “solve” the problems associated with varying flow characteristics (column 3, lines 20-22). Dickerson does not recognize or suggest that optimal flow characteristics can be achieved by the dry consumable product itself. Instead, Dickerson relies solely upon the disclosed consumption device to solve the problems of varying flow characteristics. Since the Dickerson container solves the problems associated with varying flow characteristics, Dickerson provides no reason to modify the contained dry food product in any manner or to look to Perry, which solely deals with the effect of product characteristics on product flow. In fact, Dickerson is designed specifically to deal with foods having non-uniform characteristics impeding flow of the dry food product. As such, Dickerson fails to provide a requisite suggestion to modify its packaged consumable good article to include a plurality of pieces having characteristics configured to promote substantially uniform, gravity induced flow. Accordingly, Dickerson also fails to suggest a dry consumable

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product having pieces that are substantially uniform in at least two characteristics selected from the group consisting of a shape, size, and density as recited in independent claim 21.

In addition, Foehse does not teach a plurality of pieces that are substantially uniform in at least two of the characteristics selected from the group of shape, size, and density. As described above, Foehse teaches a wide range piece dimension effectively allowing the size of the pieces to differ on a magnitude of 10, which is hardly uniform. Furthermore, Foehse is merely concerned with a new composition of high-soluble fiber barley expanded cereal and does not teach selecting size, shape, or density to promote substantially uniform, gravity induced flow through a pour opening as required by claim 21. Kraig similarly fails to alter this analysis as it merely provides density and diameter ranges for dried fruit pieces and ready-to-eat cereals and does not teach or otherwise suggest a plurality of pieces that are substantially uniform in at least two characteristics configured to promote substantially uniform, gravity induced flow. As such, for at least the above describe reasons none of the cited references teach or otherwise suggest the limitations of independent claim 21.

Claims 22-24 and 46-48 each depend from independent claim 21. As previously described, none of the cited references teach or otherwise suggest the limitations of independent claim 21. Therefore, dependent claims 22-24 and 46-48 are believed to be similarly allowable.

Amended independent claim 32 was also rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry and under 35 U.S.C. §103(a) as being unpatentable over Ness in view of Foehse. Independent claim 32 relates to a method of manufacturing of packaged consumable product article. The method includes providing a container including a first compartment, a second compartment connected to the first compartment, and first pour opening fluidly connected to the first compartment for facilitating restricted product flow therefrom, and a second pour opening fluidly connected to the second compartment for facilitating restricted product flow therefrom. The method further includes dispensing a volume of liquid consumable product into the first compartment, providing a new consumable product, dispensing a quantity of the new product including a plurality of new product pieces, and dispensing a quantity of the new product pieces into the second

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compartment. The new consumable product provided is based upon an ingredient composition of a known dry consumable product consisting of a plurality of known product pieces, at least one of which has a maximum outer diameter greater than 0.4 inch. The new dry consumable product has an ingredient composition identical to the ingredient composition of the known dry consumable product and is comprised of a plurality of new product pieces, each having a maximum outer dimension of not more than 0.4 inch.

For similar reasons as described above, Dickerson fails to teach or otherwise suggest the limitations of independent claim 32. Once again, Dickerson specifically believes that the problem of varying flow characteristics is solved by modifying the container (column 3, lines 20-22). With this problem now solved, Dickerson cannot be viewed as recognizing a need to modify the contained consumable product, let alone suggesting such modification. Instead, Dickerson is limited to use of a known dry food product in conjunction with the disclosed container, such as nuts, raisins, and small fruits (column 2, lines 50-56). On the contrary, the method of amended claim 32 specifically recites providing a new dry consumable product. Therefore, since a requisite suggestion to modify does not exist, Dickerson fails to teach or otherwise suggest the limitations of independent claim 32.

In addition, the Foehse reference also fails to teach the limitations of claim 32. In particular, claim 32 requires a new dry consumable product having an ingredient composition identical to the ingredient composition of a known dry consumable product. To the contrary, Foehse discloses an entirely new ingredient formula or cereal composition incorporating soluble fiber. Foehse does not describe an old, identical composition. Rather, Foehse characterizes old compositions as unable to provide a substantially fortified oat bran puffed cereal, as Foehse is directed to so provide. (column 2, lines 54-61). Foehse further describes problems with the fiber source and excess fat or oil used in prior art cereal compositions (column 3, line 1-column 4, line 13). Foehse is directed to remedy the ills of the prior art, i.e. old product compositions, by introducing a new cereal with a substantially different composition than that disclosed in the prior art. As such, the new dry consumable product of Foehse does not have an ingredient



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composition identical to the ingredient composition of the dry consumable product as required by claim 32.

Furthermore, Perry teaches the opposite of the limitations of claim 32. Claim 32 recites the maximum outer dimension of the known product pieces of greater than 0.4 inch being reduced for the new product pieces, which have a maximum outer dimension of not more than 0.4 inch. In contrast, Perry discloses that a larger particle size will increase product flow (p. 21-30, col. 2). As such, Perry teaches increasing the size of the pieces to promote flow, not decreasing the known product piece size to form smaller new product pieces as recited in claim 32.

Regarding the §103(a) rejections citing Ness as the primary reference, the claimed invention was conceived prior to provisional filing date of Ness. The Provisional Application No. 60/263,325 relating to Ness was filed January 22, 2001. As described in the concurrently submitted Declaration under 37 C.F.R. 1.131 of Charley Y. Lloyd et al. in accordance with 37 C.F.R. 1.47(a), the claimed invention was conceived prior to January 22, 2001 and the present application was diligently filed thereafter. As such, it is respectfully submitted that Ness, as relied upon by the Examiner, is not an available reference under 35 U.S.C. §103(a). Thus, it is respectfully requested that the rejection of claim 32 over Ness in view of Foehse be withdrawn.

Therefore, for at least the reasons described above, none of the cited references teach or otherwise suggest the limitations of amended claim 32. Accordingly, Applicants believe amended claim 32 to be allowable subject matter.

Dependent claims 33-38, 49, and 50-54 were rejected under 35 U.S.C. §103(a) over Dickerson in view of Newarski, Foehse, and Perry and/or over Ness in view of Foehse. Claims 33-38, 49, and 50-54 depend from independent claim 32. As described above, none of the cited references teach or otherwise suggest the limitations of independent claim 32. In addition, also as described above and described in the concurrently submitted Declaration, the current invention was conceived prior to the provisional filing date of Ness. Therefore, Ness is not available as a reference under 35 U.S.C. §103(a). As such, dependent claims 33-38, 49, and 50-54 are believe to be similarly allowable.

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Claim 39 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. Amended claim 39 relates to a method of manufacturing a package consumable product article and includes providing a dry consumable product comprised of a plurality of substantially uniform pieces, each having a density of not less than 225 g/100 inch<sup>3</sup> and a maximum outer dimension in the range of 0.2 – 0.25 inch. For similar reasons, as previously described with respect to independent claims 1, 7, and 14, none of the cited references teach or otherwise suggest such these limitations. For example, Dickerson solves the problems associated with the varying food flow characteristics by the consumption device itself. The device of Dickerson, therefore, does not suggest modifying the dry food consumable product contained therein. As such, Dickerson fails to teach or otherwise suggest modifying its packaged good article to include a plurality of substantially uniform product pieces having a maximum outer dimension in the range of 0.2 – 0.25 inch. Furthermore, Newarski, Foehse, and Perry fail to alter this analysis as described above. In particular, Foehse teaches a large allowable range of outer dimensions rather than substantially uniform pieces. In addition, Perry discloses that the use of larger pieces promotes product flow. Viewing Foehse in view of Perry, therefore, suggests sizing pieces near the top of the dimension range disclosed in Foehse (i.e. near 0.991 inch), which is clearly not within the 0.2 – 0.25 inch range of the dry consumable product provided in claim 39. Therefore, it is respectfully submitted that amended claim 39 recites allowable subject matter.

Claims 40 and 43-45 were also rejected under 35 U.S.C. § 103(a) as being unpatentable over Dickerson in view of Newarski, Foehse, and Perry. Each of claims 40 and 43-45 depend from amended claim 39. As previously described, amended claim 39 is not taught or otherwise suggested by the cited references. Therefore, claims 40 and 43-45 are similarly believed to be allowable.

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**CONCLUSION**

In light of the above, Applicant believes independent claims 1, 7, 14, 21, 32, and 39 and the claims depending therefrom, are in condition for allowance. Allowance of these claims is respectfully requested.

No fees are required under 37 C.F.R. 1.16(b)(c). However, if such fees are required, the Patent Office is hereby authorized to charge Deposit Account No. 500471.

The Examiner is invited to contact the Applicants' Representative at the below-listed telephone number if there are any questions regarding this response.

Respectfully submitted,

Charley Y. Lloyd et al.,

By their attorneys,

DICKE, BILLIG & CZAJA, PLLC

Fifth Street Towers, Suite 2250

100 South Fifth Street

Minneapolis, MN 55402

Telephone: (612) 573-2004

Facsimile: (612) 573-2005

Date: July 23, 2003  
TAC:mad

Timothy A. Czaja  
Timothy A. Czaja  
Reg. No. 39,649

**CERTIFICATE UNDER 37 C.F.R. 1.8:**

The undersigned hereby certifies that this paper or papers, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 23rd day of July, 2003.

By Timothy A. Czaja  
Name: Timothy A. Czaja